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No. 96-31

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH

*Petitioner*,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of California**

## SUPPLEMENTAL BRIEF

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## QUESTIONS PRESENTED

California imposed substantial penalties and a cease-and-desist order on Evelyn Smith, a widow and landlord who earns her living by renting four one-bedroom units that she owns, when she refused to rent to an unmarried couple because of her religious convictions against facilitating fornication.

1. Whether the court below erred in holding that prohibiting and penalizing religiously motivated conduct imposes no substantial burden on the exercise of religion, under the Religious Freedom Restoration Act or the Free Exercise Clause, if people may avoid the penalties by selling their property and permanently abandoning their occupations?

2. Whether a ban on housing discrimination against unmarried couples, as applied to an owner of four rental units who has sincere religious objections to facilitating fornication, serves a compelling interest by the least restrictive means where:

a. The state does not pursue its alleged interest uniformly, because the fair housing statute permits all state-operated and private colleges and universities to exclude unmarried couples from campus housing, and because state law discriminates between married and unmarried couples in myriad other ways; and

b. The state offered no evidence that unmarried couples have serious difficulty finding housing?

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# SUPPLEMENTAL BRIEF

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## INTRODUCTION

This Court is apparently holding this case for the decision in *City of Boerne, Texas v. Flores,* No. 95-2074. At the time the petitioner wrote the cert petition last year (July 1996), she and her attorneys were unaware that this Court desired to address the question of the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.*

On Monday, June 23, 1997, petitioner learned that this Court had reconferenced this cert petition for the June 26, 1997 conference. This Court is expected to announce its decision in *City of Boerne* on Wednesday or Thursday, June 25 or June 26,

1997. Obviously, that decision will affect this Court's disposition of this cert petition.

Petitioner Mrs. Smith submits this supplemental brief under Supreme Court Rule 15.8 to address this Court's new decision in *City of Boerne v. Flores.* At this time, the decision has not yet been announced. But if petitioner waits for the decision to come down before writing a supplemental brief, this Court will have already voted in conference on Mrs. Smith's cert petition.

Therefore, petitioner submits this supplemental brief while there is still time before this Court rules on Mrs. Smith's cert petition. Petitioner assumes that this Court will either uphold RFRA or strike it down as unconstitutional. This supplemental brief will address both scenarios. Petitioner Mrs. Smith urges this Court in either case to grant review or GVR (grant, vacate and remand) the case back to the California Supreme Court.

## I.

## IF THIS COURT DECLARES RFRA UNCONSTITUTIONAL, THIS COURT SHOULD *GVR* THIS CASE BACK TO THE CALIFORNIA SUPREME COURT TO RULE ON MRS. SMITH'S OTHER DEFENSES

This case concerns the State of California's prosecution of Evelyn Smith for marital status discrimination under the California Fair Employment and Housing Act when she refused to rent one of her four townhomes to an unmarried couple because of her Biblical beliefs against sex outside of marriage. During the ten years this case has been in litigation, Mrs. Smith has asserted that the prosecution violates her rights under the Free Exercise Clause, as well as the Freedom of Speech Clause and her property rights under the Fifth and Fourteenth

Amendments. *See* cert petition at 28-29.

In a nutshell, Mrs. Smith claims two different "hybrid claims" under *Employment Division v. Smith,* 494 U.S. 872, 881 (1990), which trigger review under the compelling state interest test. The California Court of Appeal found that Mrs. Smith stated a claim of free exercise plus freedom of speech, because the state is coercing her to post signs she would not post on her own. Cert. Pet. App. 165a-171a.

Mrs. Smith also states a hybrid claim of free exercise plus property rights under the Takings Clause and the Fourteenth Amendment. The California Supreme Court has put this hybrid right clearly at issue with its ruling that Mrs. Smith must either violate her religious beliefs or sell her rental property.

There are at least two ways governmental action can effect a taking of property -- a physical intrusion, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992) or action that deprives the owner of economically viable use of the land. *Id.* at 1016. Here the state does both. First, the state commands a physical intrusion. The fair housing commission ordered Mrs. Smith to "cease and desist" her marital status discrimination, thereby forcing Mrs. Smith to allow people to occupy her town homes that she would not absent government coercion. This compelled physical intrusion violates her right to exclude others from her property. *See Dolan v. City of Tigard,* 512 U.S. 374 (1994).

The California Supreme Court focused on the RFRA claim and did not rule on Mrs. Smith's other defenses. If this Court declares RFRA unconstitutional, it should grant, vacate and remand the case back to the California Supreme Court for rulings on Mrs. Smith's other defenses of free exercise of religion, freedom of speech and property rights.

## II.

## IF THIS COURT UPHOLDS RFRA, THIS COURT SHOULD GRANT REVIEW ON THE IMPORTANT QUESTION OF WHAT CONSTITUTES "A SUBSTANTIAL BURDEN"

If this Court upholds the constitutionality of RFRA, then this Court should grant review in this case because it presents an important question of what constitutes "a substantial burden" under the statute. The main opinion, written by Justice Werdegar, ruled that the state had not substantially burdened Mrs. Smith's rights under the federal Free Exercise Clause or RFRA because she could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." Cert. Pet. App. 32a.

The California Supreme Court fundamentally misunderstood where the conflict between the state law and the religious adherent's beliefs are in this case. This case is not about whether the State of California can legally prohibit Mrs. Smith from being a landlord when she feels a religious call from God to work as a landlord. The conflict is whether the State can punish Mrs. Smith for refusing on religious grounds to rent to an unmarried couple. The California Supreme Court found that there was no substantial burden on Mrs. Smith rights, even though she "is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment, as Justice Kennard said in her dissent. (Cert. Pet. App. 80a).

The California Supreme Court makes RFRA useless to most people in California if the State can inflict this much punishment on someone and still evade meeting RFRA's requirement of a "substantial burden." The language of RFRA

must mean that Mrs. Smith has suffered a substantial burden. This Court needs to grant review and reverse the California Supreme Court's erroneous interpretation of "substanial burden" under RFRA.

In the alternative, this Court should GVR this case back to the California Supreme Court to reconsider its decision in light of this Court's decision upholding RFRA (if that is what this Court rules in *City of Boerne*).

## CONCLUSION

Mrs. Smith is a 64-year-old widow who earns most of her income from renting her four townhouses in Chico, California. The California Supreme Court ruled that she has no defense in this case because she can abandon her profession as landlord and sell all of the housing that produces her livelihood. This Court should protect Mrs. Smith from her adversaries by reversing the callous decision below. Mrs. Smith urges this Court to grant cert in this case and reverse, or, alternatively, GVR this case back to the California Supreme Court.

Respectfully submitted,

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